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U.S. Responses to OECD Questionnaires

Response of the United States to the Phase I Questionnaire

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QUESTIONNAIRE 1999: FIRST SELF-EVALUATION AND MUTUAL REVIEW

A. QUESTIONS CONCERNING THE CONVENTION

Formal Issues

F.1. Signature of the Convention:

The United States signed the Convention on December 17, 1997.

F.2. Ratification of the Convention:

The President of the United States sent the Convention to the Senate on May 1, 1998 for its advice and consent to ratification. The Senate voted its advice and consent on July 31, 1998, and the President is expected to sign the instrument of ratification in early November.

F.3 Enactment of any necessary implementing legislation:

The Administration sent draft legislation implementing the Convention to the Congress on May 4, 1998. The Congress passed implementing legislation on October 21, 1988, and it is expected that the President will sign it into law in early November. A copy of the implementing legislation is attached at Tab 1 and a copy of the amended FCPA is attached at Tab 2.

F.4. Entry into force of any necessary implementing legislation:

The implementing legislation will enter into force upon signature by the President.

Substantive issues

0. The Convention as a whole

0.1 Describe the general approach of your national law to implementing the Convention (1 page maximum length). (Note Commentaries 1 and 2.)

The United States believes the bribery of foreign government officials in international business transactions is a serious threat to the development and preservation of democratic institutions and strongly supports effective implementation of the Convention to assure fair and open competition in international business. Since 1977, the United States has outlawed bribery of foreign officials in commercial transactions by its nationals and companies organized under its laws. In addition, the United States has worked with other countries and in various international fora, including the OECD, the United Nations, the Council of Europe, and the Organization of American States, to encourage the enactment of similar prohibitions by other major trading countries.

The Convention approved by this Working Group and signed by representatives of the OECD member States and

five other countries in December 1997closely parallels the United States Foreign Corrupt Practices Act (the "FCPA"). In a few areas, e.g., coverage of bribes by non-nationals and coverage bribes to officials of international organizations, the Convention was broader than the FCPA, and the United States has enacted legislation to conform the FCPA to those provisions of the Convention. In other areas, e.g., coverage of political parties, party officials, and candidates for public office, the Convention is narrower than the FCPA, and the United States continues to encourage that these areas be addressed.

1. Article 1. The Offence of Bribery of Foreign Public Officials

1.1 Describe how your national law and legal system implement the requirements of Article 1, concerning the offence of bribery of foreign public officials. In this description pay particular attention to explaining how your law treats the elements in the following checklist. The Commentaries corresponding to the Article provide guidance on the interpretation of certain elements.

The Foreign Corrupt Practices Act of 1977 (the "FCPA"), as amended, 15 U.S.C. §§78m, 78dd-1, *et seq.*, requires all publicly-traded corporations to maintain transparent books and records and prohibits *all* U.S. companies and nationals from making any payment or gift, or offering to do so, to a broad range of foreign public officials. Specifically, the FCPA prohibits:

1. the use of the mails or other means or instrumentality of interstate commerce

2. corruptly

3. in furtherance of an offer, payment, promise to pay or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value

4. to any foreign official, foreign political party, foreign political party official, or any other person knowing that all or a portion of such gift will be offered, given or promised, directly or indirectly, to such persons

5. for the purpose of:

- influencing any act or decision of such officials,

- inducing such officials to do or omit to do any act in violation of the lawful duty of such officials,

- obtaining an improper advantage, or

- inducing such officials to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality

6. to assist the payor of such payment or gift in obtaining or retaining business for or with, or directing any business to, any person.

Prior to its 1998 amendments, the FCPA substantially implemented Article 1 of the Convention. It established a criminal offense for U.S. nationals and businesses to bribe, or attempt to bribe, foreign officials in connection with obtaining or retaining business. To fully implement the Convention, the United States has amended the FCPA to cover prohibited acts by "any person," including foreign nationals who take any act within the United States in furtherance of a bribe or attempted bribe; to assert nationality jurisdiction over U.S. nationals and businesses for acts taken outside the United States; to expand the definition of foreign public official to include officials of international organizations; and to explicitly incorporate the Convention's terminology with respect to "other improper advantage."

In addition to the subjecting American companies to criminal prosecutions, the passage of the FCPA encouraged American businesses engaged in international business to develop comprehensive corporate compliance programs, in which corporations establish procedures to prevent the payment of bribes, conduct internal investigations when allegations of bribery are brought to management's attention, and voluntarily disclose to the government any bribery uncovered as a result of their investigation. The combination of vigilant enforcement by the government and voluntary compliance programs by the private sector, in our view, has significantly reduced the payment of bribes by American businesses.

In addition to criminal penalties, the FCPA provides for significant civil and penal remedies, including injunctions, fines, and imprisonment. Civil enforcement responsibility over public companies is entrusted to the United States Securities and Exchange Commission (the "SEC"), and criminal enforcement over all companies and individuals, as well as civil enforcement over non-public companies, is entrusted to the Department of Justice.

- **any person**

As amended, the FCPA covers bribes paid by "any person." Prior to its 1998 amendments, the FCPA prohibited bribes and attempted bribes by "issuers" and "domestic concerns," as well as their officers, directors, employees, agents, and their shareholders acting on behalf of the issuer. 15 U.S.C. §§ 78dd-1, 78dd-2. "Issuers" included any corporation, domestic or foreign, that had registered a class of securities with the SEC or is required to file reports with the SEC, i.e., any corporation with its stocks, bonds, or American depository receipts traded on U.S. stock exchanges or the NASDAQ Stock Market. "Domestic concerns" included all citizens, nationals, and residents of the United States as well as all business entities, other than issuers, that had their principal place of business in the United States or which were organized under the laws of the United States or a political subdivision thereof. See 15 U.S.C. § 78dd-2(h)(1). The 1998 amendments extended coverage of the FCPA to all other persons, natural or juridical, who do any act in furtherance of a bribe while in the territory of the United States. *See* 15 U.S.C. § 78dd-3.

- **intentionally**

The FCPA requires that the person charged have undertaken an act in furtherance of the unlawful payment

"corruptly." "Corruptly" requires intent. As stated in the legislative history of the FCPA:

The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.

See Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4098, 4108.

- **to offer, promise, or give**

The FCPA covers acts in furtherance of "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **any undue pecuniary or other advantage**

The FCPA covers both the payments of money or the gift "of anything of value." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **whether directly or through intermediaries**

The FCPA prohibits payments or gifts (or offers thereof) either directly or through intermediaries. An unlawful payment under the FCPA includes payments made to "*any* person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to a foreign official. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

- **to a foreign official**

As amended, the FCPA definition of "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *See* 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

The FCPA thus applies to payments to foreign officials who are employees of "instrumentalities" of foreign governments and public international organizations. Although the FCPA does not contain an explicit reference to "public enterprises" or any definition thereof, the United States has consistently applied to the FCPA to cover bribery of officials of public enterprises. State-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. The Department of Justice, which enforces the criminal provisions of the FCPA, has not adopted a bright-line test for determining which enterprises are instrumentalities. Among the factors that it considers are the foreign state's own characterization of the enterprise and its employees, i.e., whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.

The FCPA also prohibits payments to "any candidate for foreign political office" and "any foreign political party or official thereof" to influence that party's or individual's decision-making or to induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business.

Although the FCPA does not define "foreign country," Other provisions of the U.S. Code provide guidance. For instance, the Foreign Agent Registration Act, which has been incorporated into other statutes, provides:

The term "government of a foreign country" includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

22 U.S.C. § 611(e). *See also* 5 U.S.C. § 7342(a)(2) (gifts from foreign governments). Title 18 of the United States Code, which contains most federal criminal offenses (but not the FCPA), provides:

The term "foreign government" … includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

Finally, the United States has made specific provisions for certain governments. For instance, although the United States does not recognize Taiwan as an independent sovereign state, the U.S. Code provides that wherever U.S. laws refer to foreign countries or governments such terms should be read to include Taiwan and such laws, including the FCPA, should apply with respect to Taiwan. *See* 22 U.S.C. § 3303.

- **for that official or for a third party**

Whether the public official benefitted personally from an unlawful payment or gift or directed that the payment or gift be directed to a third person is irrelevant under the FCPA. The sole issue is whether the payment or gift (or offer or promise) of money or anything of value was made to the public official.

- **in order that the official act or refrain from acting in relation to the performance of official duties**

The FCPA prohibits payments that are intended to "influenc[e] any act or decision of [a] foreign official in his official capacity, or [to] induc[e] such foreign official to do or omit to do any act in violation of the lawful duty of such

official, or [to] induc[e] such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

The FCPA includes payments to induce a foreign public official to use his influence, whether or not the award of specific business is within his authorized duties.

- **in order to obtain or retain business or other improper advantage**

The FCPA prohibits payments made to influence a foreign public official's decision or to induce him to do or omit to do an act "to assist such [issuer, domestic concern, or other person] in obtaining or retaining business for or with, or directing business to, any person." *See* 18 U.S.C. § 78dd-1(a), 78dd-2(a), 78dd-3(a). The 1998 amendments to the FCPA clarify that the FCPA covers payments to"secure any improper advantage" in connection with obtaining or retaining such business. *See id*.

The legislative history of the FCPA, even prior to the 1998 amendments, made it clear that "'retaining business' . . . is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as the payment to a foreign official for the purpose of obtaining more favorable tax treatment." H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 918, *reprinted in* 1988 U.S. Code Cong. & Ad. News 1547, 1951.

Under the FCPA, it is the payor's intent that is relevant, not the actual result. It is not a defense that the payment was gratuitous. Thus, even if the payor was the most qualified bidder and would have received the contract without making the unlawful payment, the payor's corrupt intent is sufficient to obtain a conviction.

The FCPA does not prohibit "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The FCPA provides an illustrative list of what qualifies as "routine governmental action." This list includes:

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and

(v) actions of a similar nature.

The FCPA, however, states that "routine governmental action" does not include "any decision . . . to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

- **in the conduct of international business**

The FCPA is limited to payments to obtain or retain business. Such payments, when made to foreign public officials by U.S. nationals or business entities, necessarily involve "international" business.

1.2 On what basis does your legal system establish complicity in the bribery of a foreign public official as a criminal offense?

Complicity in a crime is considered "aiding and abetting" under U.S. law. Aiding and abetting of any crime is itself a crime under United States law, and a person convicted of aiding and abetting a crime is punishable to the same extent as if he had committed the crime himself. *See* 18 U.S.C. § 2(a) ("Whoever . . . aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). Similarly, one who causes another to commit a crime is punishable as a principal under U.S. law. *See* 18 U.S.C. § 2(b).

Because these provisions apply to all crimes under U.S. law, the FCPA does not itself contain an explicit aiding and abetting provision. The FCPA does, however, contain an explicit prohibition on the "authorization of the payment of any money, or . . . authorization of the giving of anything of value." *See* 18 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

Under U.S. law, the crime is complete upon the authorization of the bribe, regardless of whether the bribe is actually offered or paid and regardless of whether it is successful, provided that the jurisdictional element is satisfied. However, where a person encourages or incites a third party to commit an act, but does not himself do any act within the scope of the FCPA, e.g., where he is not in a position to authorize the act, that person can only be prosecuted if the third party actually violates the FCPA. Under U.S. law, a person who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal" in the crime. 18 U.S.C. § 2. As discussed herein, it is not necessary that the bribe be actually paid or that it be successful, it is only necessary that the third party violate the FCPA by offering, promising, or authorizing the unlawful payment or gift.

1.3 How does your legal system treat attempt and conspiracy to bribe a domestic public official? How are attempt and/or conspiracy treated with respect to bribery of a foreign public official?

The FCPA is modeled on the United States law concerning bribery of a domestic official, *see* 18 U.S.C. § 201, and the treatment of attempt and conspiracy under both laws is the

same. Under U.S. law, it is a crime to conspire to commit any other crime. *See* 18 U.S.C. § 371. Thus, there is no separate conspiracy provision either in the United States' domestic bribery laws or in the FCPA. The United States has repeatedly brought conspiracy prosecutions for conspiracies to violate the FCPA. *See, most recently, United States v. Mead* , Cr. 98-250-01 (D.N.J. 1998); *United States v. Crites*, Cr. 3-98-073 (S.D. Ohio 1998).

There is no general "attempt offense" under U.S. law. However, neither a completed payment nor a successful result is a requirement under the FCPA. *See* Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4098, 4108 (The FCPA "does not require that the act be fully consummated, or succeed in producing the desired result."). Both laws prohibit an *offer* or *promise* as well as a payment. The legislative history on this point is also very clear: a corrupt offer is sufficient. This is the same approach as is contained in the United States' laws concerning bribery of a domestic official. *See* 18 U.S.C. § 201.

2. Article 2: Responsibility of Legal Persons

2.1 Does your national law or legal system establish criminal responsibility of legal persons for the bribery of a foreign public official? If it does, describe with a significant level of detail how criminal liability of legal persons is applied. Address questions such as:

> **Which legal entities or which companies are subject to criminal responsibility? Are state-owned or state-controlled companies subject to criminal responsibility?**
>
> **Is the criminal responsibility of the legal person based on a strict liability concept, or does it depend on a culpable act by a representative of the company?**
>
> **Is the criminal responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?**

Under general legal principles, the United States holds legal persons criminally responsible for the bribery of a foreign public official, as it does for any other crime. The United States Code provides that the "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Prior to the 1998 amendments, the FCPA applied only to "issuers," a term that, in general, refers to publicly-traded companies, *see* 15 U.S.C. § 78dd-1, and "domestic concerns," a term that was defined to include "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship." *See* 15 U.S.C. § 78dd-2(h)(1)(B). The 1998 amendments expanded the FCPA's coverage to any legal person, wherever incorporated, that takes any act in furtherance of an unlawful bribe within the territory of the United States.

The United States has approximately eleven mixed-ownership (governmental/private) corporations and seventeen wholly-owned Government corporations, most of which are involved in the banking system either by making credit available or guaranteeing loans. *See* 31 U.S.C. § 9101. The United States has never brought a criminal prosecution against a government-owned corporation under the FCPA.(1) Nothing in the statute, however, would prohibit such a prosecution. Thus, if a government-owned enterprise is organized as a corporate identity according to the laws of the state of incorporation or and thus falls within the definition of a "domestic concern," "issuer," or "person" under the FCPA, the Department of Justice could bring a criminal prosecution against such an enterprise.

With the exception of certain regulatory offenses related to health and safety, the United States does not apply strict liability in the case of criminal liability. A corporation is held accountable for the unlawful acts of its officers, employees, and agents under a *respondeat superior* theory when the employee acts (i) within the scope of his or her duties and (ii) for the benefit of the corporation. In both instances, these elements are interpreted broadly. For example, an employee may be entrusted to market a corporation's goods. If he commits a crime in the course of and related to the marketing of the corporation's goods, that crime will be deemed to have been in the scope of his duties. Similarly, an employee may act for many purposes, most of which may be in his own interests. However, if the corporation derives a benefit from the employee's unlawful acts, that act will be deemed to have been for its benefit. Thus, a corporation is generally liable for the acts of its employees with the limited exception of acts that are truly outside the employee's assigned duties or which are contrary to the corporation's interests, e.g., where the corporation is the *victim* rather than the beneficiary of the employee's unlawful conduct.

Corporate criminal liability is premised on the act of *any* corporate employee, not merely high-level executives. Participation, acquiescence, knowledge, or authorization by higher level employees or officers, however, will be relevant to the determination of the appropriate sanction. Under the applicable sentencing guidelines, higher fines may be imposed when a corporation's management participates in or fails to take appropriate steps to prevent unlawful conduct.

2.2 If the answer to the initial question in 2.1 above is "no," describe with a significant level of detail how your national law or legal system establishes the liability of legal persons for the bribery of a foreign public official. As in 2.1, address questions such as:

> **Which legal entities or which companies are subject to responsibility for bribery of a foreign public official? Are state-owned or state-controlled companies subject to responsibility for the offence?**
>
> **Is the responsibility of the legal person based on a strict liability concept, or does it depend upon a culpable act by a representative of the company?**
>
> **Is the responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?**

The United States' answer to 2.1 was "yes."

3. Article 3: Sanctions

3.1 Describe the criminal penalties which your legal system applies to bribery of domestic public officials.

The relevant statute is 18 U.S.C. § 201, which provides for a fine of "not more than three times the monetary equivalent of the thing of value [offered or given to the public official]" or imprisonment for not more than fifteen years, or both, and the possibility of disqualification from holding "any office of honor, trust, or profit under the United States." In addition, under the alternative fines provision of the United States Code, the maximum fine is the greater of $250,000 for an individual or $500,000 for an organization or twice the gross pecuniary gain to the defendant or the gross pecuniary loss to the victim of the crime. *See* 18 U.S.C. § 3571. In addition, in cases involving bribery related to a government contract, an organization or individual may be barred from doing business with the United States government generally or with specific agencies. See *Federal Acquisition Regulation* 9.4 (48 C.F.R. Subpt. 9.4) (disbarment from all government contracting for conviction or civil judgment for fraud or other offense indicating lack of business integrity); *see also* Foreign Assistance Act of 1961 § 237(1) (Overseas Private Investment Corporation); 7 C.F.R. § 1493.270 (Commodity Credit Corporation).

3.2 Describe the effective, proportionate, and dissuasive (nature and level of) criminal penalties for bribery of a foreign public official for natural, and, if applicable, legal persons.

The FCPA provides that a legal person may be sentenced to pay a fine of not more than $2,000,000 and that a natural person may be sentenced to pay a fine of not more than $100,000 and imprisoned not more than five years. As with bribery of domestic public officials, the actual fines that may be imposed are substantially higher due to the alternative fines provisions of the United States Code. Thus, the maximum fine is the greater of $250,000 for an individual or $500,000 for an organization or twice the gross pecuniary gain to the defendant or the gross pecuniary loss to the victim of the crime. *See* 18 U.S.C. § 3571. Thus, defendants in FCPA cases have often been fined greatly in excess of the amounts specified in the FCPA itself. Further, defendants convicted of FCPA offenses risk disbarment from federal contracting, particularly in the sale of military equipment to foreign governments, sales that are regulated by the U.S. government.

In addition, the FCPA provides for civil penalties, which may include both a fine and an injunction. *See* 15 U.S.C. §§ 78u(c); 78dd-2(d) & (g); 78dd-3(d) & (e); 78ff(c).

3.3. For natural persons, are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable effective mutual legal assistance? Explain.

The penalties under the FCPA include imprisonment of natural person for up to five years. FCPA offenses are, therefore, serious offenses under the U.S. legal system, and the United States government will seek legal assistance from other countries to aid in the prosecution of these offenses.

3.4. Are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable extradition? Explain.

The penalties under the FCPA include imprisonment of natural person for up to five years. FCPA offenses are, therefore, serious offenses under the U.S. legal system, and the United States government will seek extradition from other countries.

3.5 If, under your legal system, criminal responsibility is not applicable to legal persons (and hence criminal penalties are not described in the reply to 3.1 above) describe the effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, applicable to legal persons for bribery of foreign officials.

As noted above, criminal responsibility is applicable to legal persons under the United States legal system, and legal persons face substantial criminal sanctions. In addition, however, legal persons are also liable to substantial civil sanctions, including fines and permanent injunctions, and may also be barred from government contracting or from participating in certain foreign sales programs, such as government contract guarantees.

3.6. By what laws or other dispositions does your legal system provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation?

As noted above, a defendant that is a legal person may be fined *twice* the pecuniary value of the gross gain from the unlawful payment or $2,000,000, whichever is greater. In addition, although forfeiture is not provided for in the FCPA itself, violations of the FCPA are predicate offenses for the money laundering offense, and forfeiture is available under that provision. *See* 18 U.S.C. §§ 1956 & 981, 982.

3.7. <u>If</u> your legal system does not provide for seizure and confiscation of the bribe, the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds (the reply to 3.5 is null), describe how your legal system applies monetary sanctions of comparable effect.

See response to 3.5.

3.8. Does your legal system impose additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official? If the answer is "no," has your country considered the imposition of such additional sanctions?

Persons that violate the FCPA are subject to both civil and administrative sanctions. Civil sanctions may include additional fines, as well as a permanent injunction prohib-

iting them from engaging in the unlawful business practices. Administrative sanctions may include disbarment from government contracting, e.g., government contracting, including defense procurement, *see* 10 U.S.C. §2408 (prohibiting defense-related employment by individuals convicted of procurement-related felony); 48 C.F.R. Subpt. 9.4 (disbarment of any company convicted of crime involving fraud or indicating lack of business integrity); and from participation in various government programs, e.g., overseas investment guarantees. *See*, e.g., Foreign Assistance Act of 1961 § 237(1) (Overseas Private Investment Corporation); 7 C.F.R. § 1493.270 (Commodity Credit Corporation).

4. Article 4: Jurisdiction

4.1 Does your country establish jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory? In what way does your legal system adopt a broad interpretation of the territorial basis for jurisdiction? Explain the cases in which a partial connection of the offense to the territory would enable jurisdiction to be established.

Prior to its amendment in 1998, the FCPA asserted only territorial jurisdiction. It required that the defendant "make use of the mails or any means or instrumentality of interstate commerce … in furtherance of an [unlawful payment, gift, or offer, or authorization of the same]." It was not necessary, however, that the payment, gift, offer, or authorization itself have taken place in the United States, only that an act in furtherance have taken place. Thus, if two officials of a corporation, at least one of whom was in the United States, corresponded (by mail, fax, or E-mail) or spoke with each other over the telephone concerning a planned unlawful payment, that would be sufficient for the United States to assert jurisdiction, even if the payment itself, the official to be bribed, the person actually paying the bribe, and the money to be used to pay the bribe are all outside the territory of the United States.

The United States interprets "territory" broadly. It includes the actual territorial boundaries of the fifty States, as well as territories, possessions, and commonwealths. In addition, it includes areas within its territorial waters, aboard ships and airplanes flying under its flag, and aboard aircraft en route to the United States.

The 1998 amendments expanded the FCPA to cover "any person." For non-U.S. nationals and non-U.S. companies, the amended FCPA requires that the person to be prosecuted actually have committed an act in furtherance of a bribe within the U.S.

4.2. Does your country have jurisdiction to prosecute its nationals for offenses committed abroad? If the answer is "yes," does it establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles? Describe the conditions under which your country would have jurisdiction to prosecute a national for the offense of bribery of a foreign public official.

Under its constitutional principles, the United States has jurisdiction to prosecute its nationals for offenses committed abroad, although it is a jurisdiction that is rarely invoked. As amended, the FCPA asserts nationality jurisdiction in cases of bribery of foreign government officials. The amended FCPA reaches all issuers or other businesses "organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof" and all U.S. nationals who "corruptly do any act outside the United States in furtherance of [an unlawful payment, gift, or offer, or authorization thereof]."

4.3. What procedures do you have in place to allow consultations and eventual transfer of a case to another Party which can also establish jurisdiction over an alleged offense described in this Convention?

The United States frequently arranges consultation on such matters through the Department of Justice's Office of International Affairs, which is the Central Authority for the United States on mutual legal assistance matters.

4.4. Has your country reviewed whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials? Have any steps been taken to improve the basis for establishing jurisdiction?

The United States believes that its expansive definition of territorial jurisdiction has been effective and sufficient to reach bribery by U.S. nationals and businesses. However, to close any possible gaps, the United States has expanded the jurisdictional scope of the FCPA to include an assertion of nationality jurisdiction. See 4.2 above.

5. Article 5: Enforcement

5.1. Describe the rules and principles which govern investigation and prosecution of the bribery of a foreign public official. In particular, under what circumstances are your authorities permitted to initiate, suspend, and terminate an investigation or prosecution?

FCPA investigations are subject to the same rules and principles as govern any federal criminal or SEC civil investigation. A prosecutor is required, as always, to make an initial assessment of the merits of the cases, the likelihood of obtaining sufficient evidence to obtain a conviction, and the availability of sufficient investigative and prosecutive resources. Political or economic interests are not relevant to this decision. To ensure that uniform and consistent prosecutive decisions are made in this particular area, all FCPA investigations are supervised by the Criminal Division of the U.S. Department of Justice. Similarly, political or economic interests are not relevant to the SEC's decisions to investigate or bring cases to enforce the civil provisions of the FCPA against issuers.

5.2. Can the investigation and/or prosecution of the bribery of a foreign public official be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved? For what reasons, and under what circumstances?

FCPA prosecution decisions are based on the merits of the case, not political or economic considerations. Political bodies and non-criminal government bodies have no influence on the investigation and prosecution of foreign public officials. FCPA investigations and prosecutions are handled by career prosecutors and supervised by the Criminal Division of the U.S. Department of Justice. There is no requirement that any other agency within the U.S. government be consulted before bringing charges. The SEC, which enforces the civil provisions of the FCPA against issuers, is an independent, nonpartisan agency. SEC investigations are handled by experienced attorneys, under the direction of a five-member Commission.

6. Article 6: Statute of Limitations

6.1. In your legal system, what, if any, is the statute of limitations applicable to the offense of bribery of a foreign public official?

The statute of limitations for FCPA offenses is five years. See 18 U.S.C. § 3282. However, when the government needs to obtain evidence from a foreign country, the statute may be suspended for up to three years. *See* 18 U.S.C. § 3292.

7. Article 7: Money Laundering

7.1. Is bribery of a domestic public official a predicate offense for the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

Bribery of a domestic public official is a predicate offense under the Money Laundering Control Act. *See* 18 U.S.C. § 1956(c)(7)(a) (incorporating 18 U.S.C. § 1961(1), which lists 18 U.S.C. § 201 as a predicate offense). It does not matter where the bribery occurred. The Money Laundering Control Act explicitly provides for extraterritorial jurisdiction over U.S. nationals and, provided that some conduct occurred within the U.S., over non-U.S. nationals. *See* 18 U.S.C. § 1956(f).

7.2. Is bribery of a foreign public official a predicate offense for the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

Bribery of a foreign public official has been a predicate offense under the United States Money Laundering Control Act since 1992. *See* 18 U.S.C. § 1956(c)(7)(D). As noted, both with respect to the FCPA and the Money Laundering Control Act, where the bribe took place is irrelevant. The Money Laundering Control Act contains an assertion of extraterritorial jurisdiction over U.S. nationals and, in some circumstances, non-U.S. nationals. *See* 18 U.S.C. § 1956(f).

8. Article 8: Accounting

8.1. In the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, does your country prohibit the establishment of off-the-books accounts,

- **the making of off-the-books or inadequately identified transactions,**
- **the recording of non-existent expenditures,**
- **the entry of liabilities with incorrect identification of their object,**
- **the use of false documents**

for the purpose of bribing foreign public officials or hiding such bribery?

In addition to the anti-bribery provisions of the FCPA, the statute also requires issuers with a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") -- or any issuer that is required to file reports under Section 15(d) of the Exchange Act—to maintain records that accurately reflect transactions and dispositions of corporate assets, and to maintain systems of internal accounting controls. Section 13(b)(2)(A-B) of the Exchange Act requires that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." This section also requires issuers to "devise and maintain a system of internal accounting controls" sufficient to provide reasonable assurance that all transactions engaged in by the issuer were executed in accordance with management's authorization and were recorded in a fashion that permits preparation of financial statements in conformity with generally accepted accounting principles, and that allows for accountability of assets. The system of internal controls must also provide reasonable assurances that any access to the issuer's assets is authorized, and, finally that periodic reviews are made to determine and correct any irregularities with respect to the accountability for an issuer's assets.

Following the enactment of the FCPA in 1977, the SEC adopted two rules under Section 13 of the Exchange Act to implement the accounting provisions, Rules 13b2-1 and 13b2-2. Rule 13b2-1 prohibits any person from "directly or indirectly falsif[ying] or caus[ing] to be falsified any book, record, or account subject to section 13(b)(2)(a)" of the Exchange Act. That is, the rule prohibits any falsification of an issuer's books and records. Rule 13b2-2 makes it unlawful for directors or officers of an issuer to lie to the issuer's independent auditors. The rule further provides that no director or officer of an issuer shall, directly or indirectly, make or cause to be made, a materially false or misleading statement, or to omit to state, or cause another person to omit to state, any material fact necessary to make the statements made not misleading to an accountant in connection with the (1) audit or examination of the financial statements of an issuer, or (2) the preparation or filing of any document or report filed with the SEC.

8.2. Which companies are subject to these laws and regulations?

The books and records provisions of the FCPA apply to all "issuers," that is, companies with securities registered with the Securities and Exchange Commission.

8.3. Describe the civil, administrative, or criminal penalties for such omissions and falsifications in respect of the books, records, accounts, and financial statements of such companies.

Pursuant to section 21 of the Exchange Act, 15 U.S.C. 78u, the SEC is authorized to bring an action in the United States District Court against issuers to enjoin acts and practices in violation of the Exchange Act, including violations of the FCPA anti-bribery and accounting provisions. Under the Exchange Act, administrative remedies also may be available. In addition to its injunctive powers, the SEC may seek civil monetary penalties of $10,000 for a violation of the anti-bribery provisions of the FCPA. (Section 32(c) of the Exchange Act, codified at 15 U.S.C. 78ff.) For violations of the accounting provisions of the FCPA, the SEC may seek civil monetary penalties. 15 U.S.C. 78u. Moreover, criminal prosecutions may be brought by the Justice Department for "willful" violations of the accounting provisions of the FCPA, which actions can lead to fines of up to $1 million and/or imprisonment for up to 10 years with respect to any person, except that when a person is other than a natural person, the maximum fine rises to $2.5 million.

9. Article 9: Mutual Legal Assistance

9.1. Under which laws, treaties, and arrangements will your country be able to provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person?

The primary legal vehicle for prompt and effective mutual legal assistance will be the bilateral mutual legal assistance treaties (MLATs) in force between the United States and the other Parties to this Convention. We have MLATs in force with the following signatories to this Convention: Argentina, Canada, Hungary, Italy, Korea, Mexico, the Netherlands, Spain, Switzerland, the United Kingdom, and Turkey. The Congress has approved additional MLATs with Brazil, the Czech Republic, Luxembourg, and Poland, but they are not yet in force. In addition, Title 28, U.S. Code, Section 1782, authorizes U.S. courts to compel production of evidence for foreign authorities. In addition, various U.S. law enforcement agencies administer individual statutes that provide for cooperation between the agency and its foreign counterparts. Finally, U.S. law and practice permits and encourages informal cooperation, and in many cases mutual assistance will be possible without reliance on statutory or treaty procedures.

9.2. Will such assistance be conditional on dual criminality? If so, will dual criminality be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention?

Under U.S. law, mutual legal assistance is generally not conditional on dual criminality unless such a condition is contained in the mutual legal assistance treaty between the U.S. and the Requesting State. For example, the MLAT between the U.S. and Switzerland requires dual criminality for any assistance that requires compulsory measures.

9.3. Will it be possible for your authorities to decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy? If yes, please explain.

U.S. law generally does not require us to decline mutual legal assistance on the ground of bank secrecy.

10. Article 10: Extradition

10.1. Is bribery of a foreign public official deemed to be an extraditable offense under your country's law and the extradition treaties between your country and Parties?

Whether the bribery of a foreign public official is an extraditable offense depends on the terms of the bilateral extradition treaty in force between the U.S. and the requesting state. In the U.S., extraditable offenses are those prescribed by treaty. When the OECD Convention is in force, the offense described in Article 10(1) of the Convention will be an extraditable offense under every extradition treaty in force between the U.S. and another Party to this Convention.

10.2. In the absence of an extradition treaty with another Party, does you country consider that this Convention is a legal basis for extradition in respect of the offence of bribery of a foreign public official?

The U.S. does not consider this Convention as a legal basis for extradition to any country with which the U.S. has no bilateral extradition treaty in force. In cases where the U.S. does have a bilateral extradition treaty in force, that treaty serves as the legal basis for extradition for offenses covered by this Convention. The United States has bilateral extradition treaties in force with the following countries that signed the Convention: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Switzerland, Sweden, Turkey, and the U.K. In addition, the United States has signed an extradition treaty with Korea, but it is not yet in force.

10.3. Can your country extradite its nationals for the offence of bribery of a foreign public official?

Yes, the U.S. can extradite its nationals. The U.S. usually draws no distinction between nationals and other persons in extradition matters.

10.4. If the answer to 10.3 is "no", in cases where nationality is the sole reason for declining a request to extradite a person for bribery of a foreign public official, what rules and procedures exist so that the case will be submitted to your country's competent authorities for the purpose of prosecution?

Since the answer to 10.3 is yes, this question is not applicable.

10.5. Is the existence of dual criminality a condition for extradition? if so, is that condition deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention?

Whether dual criminality is a condition for extradition depends on the terms of the applicable extradition treaty. If dual criminality is a condition under the applicable extradition treaty between the U.S. and any other Party to this Convention, the U.S. would deem that condition to be fulfilled if the offense for which extradition is requested is within the scope of Article 1 of the OECD Convention.

11. Article 11: Responsible authorities

11.1 Has your country notified to the OECD Secretary-General an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for the matters of consultation (Art. 4.3), mutual legal assistance (Art. 9), and extradition (Art. 10)?

The United States has not yet made such a notification but expects to do so once the United States deposits its instrument of ratification with the Secretary General. The United States expects to designate the Department of Justice's Office of International Affairs as the responsible authority for consultation and mutual legal assistance and the Department of State as the responsible authority for extradition.

B. QUESTIONS CONCERNING IMPLEMENTATION OF THE 1997 RECOMMENDATION

1. General

1.1 Has your country taken any measures, other than those reported in response to questions in section A above, to meet the goal set forth in Section 1 of the Recommendation, i.e., to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions?

On June 27, 1996, the United States signed the OAS Inter-American Convention Against Corruption and has since submitted it to the Senate for its advice and consent to ratification. In addition, the United States has participated as an observer in the Council of Europe's expert working group on corruption and has contributed to the development of the draft Criminal Law Convention on Corruption that is currently under consideration in the Council of Europe. Finally, the Departments of Justice and Commerce and the SEC regularly participate in business and legal programs designed to educate the business and legal community as to the requirements of the FCPA.

1.2 Has your country examined the areas listed in paragraphs i) through vii) of Section II of the Recommendation and taken any concrete and meaningful steps to meet the goal set forth in Section 1 of the Recommendation?

The United States has examined the seven areas listed in Section II of the 1994 Recommendation. As set forth in the Questionnaire Response of the United States, dated March 15, 1995 (the "1995 U.S. Response"), concerning the Recommendation, United States criminal, civil, and administrative law all contain concrete and meaningful provisions intended to meet the goal set forth in Section 1 of the Recommendation. The Secretariat is respectfully referred to the 1995 U.S. Response for more detailed descriptions of these provisions. In summary:

i) criminal laws and their application: As discussed above in section A and in the 1995 U.S. Response at page 3-25, the United States, since the enactment in 1977 of the Foreign Corrupt Practices Act, has prohibited the bribery of foreign officials by U.S. issuers and domestic concerns, i.e., U.S. business entities and individuals, using the U.S. mails or other means or instrumentalities of interstate commerce. In 1998, following the signing of the OECD Convention, the United States amended the FCPA to prohibit bribes of foreign officials by American companies and nationals even where no act in furtherance of the bribe took place within the United States and, further, to assert jurisdiction over non-U.S. companies and nationals who take any action in furtherance of a bribe of a foreign public official while within the United States.

In addition, as described in the 1995 U.S. Response at page 17, thirty-seven states have enacted bribery laws that prohibit bribery in a commercial context. See 1995 U.S. Response, Tabs B-1 to B-37. These laws can form the basis of a federal criminal prosecution under the Travel Act, 18 U.S.C. § 1952. The United States Government has recently prosecuted a matter involving a bribe of officials of the Government of Panama in which it charged an officer of a U.S. company with violations of both the FCPA and the Travel Act (incorporating the commercial bribery law of the State of New Jersey). *See United States v. Mead*, Cr. 98-240-01 (D.N.J. 1998)

Finally, as described in the 1995 U.S. Response at pages 20-25, bribery of foreign public officials is a predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Money Laundering Control Act. *See* 18 U.S.C. §§ 1956, 1961-1964 (attached at Tabs C & D to 1995 U.S. Response).

ii) tax legislation, regulations and practice: As described below at 3.1 and in the 1995 U.S. Response at page 30, bribes and kickbacks are not deductible under the Internal Revenue Code and the unlawful deduction of bribes, kickbacks, and gratuities may be prosecuted as a civil or criminal violation. *See* 26 U.S.C. §§162(c) & 7206 (attached at Tab E to 1995 U.S. Response).

iii) company and business accounting, external audit and internal control requirements and practices: As discussed below at 4.1 and at pages 32-35 of the 1995 U.S. Response, United States law requires transparent books and records. The FCPA contains an extensive and detailed section requiring issuers to maintain records that accurately reflect transactions and disposition of corporate assets and to maintain systems of internal accounting controls. *See* 18 U.S.C. §78m (attached at Tab A-5 to 1995 U.S. response). In addition, the United States government encourages business organizations to implement codes of conduct and

compliance programs to address the application of the FCPA to a company's activities and those of its officers, directors, employees, agents, and shareholders. *See,* e.g., General Electric Company's code of conduct (attached at Tab F to 1995 U.S. Response). Although the government does not approve or disapprove of the contents of these programs, the Sentencing Guidelines that guide a federal court's imposition of fines on corporate defendants recognize the value of such programs by permitting the court to reduce the sentence where a violation occurs despite an adequate compliance program. *See* U.S.S.G. § 8C2.5(f) (attached as Tab F-1 to the 1995 Response). Otherwise, a company's failure to ensure the compliance of its employees, agents, and contractors may give rise to severe penalties.

iv) banking, financial, and other relevant provisions to ensure that adequate records would be kept and made available for inspection and investigation: As discussed below at 4.1 and at page 36 of the 1995 U.S. Response, various federal and state laws require the maintenance of financial and other business records. In addition, federal banking law requires U.S. financial institutions to report suspicious transactions, including transactions involving the suspected proceeds of criminal activity. *See* 12 Code of Federal Regulations (C.F.R.) § 21.11(c) (national banks); *see also* 12 C.F.R. § 208.20(c) (state banks); 12 C.F.R. § 208.62(c) (state banks); 12 C.F.R. § 563.180(d)(3) (savings associations); 31 C.F.R. § 103.21(c) (other banks); *see also* U.S. Response to Four Issues Questionnaire.

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases: As discussed in 5.1 below and at pages 36-40 of the 1995 U.S. Response, the United States Government, or any of its agencies, may suspend a contractor from public contracting upon its indictment for a violation of the FCPA and may debar that contractor upon its conviction. See Federal Acquisition Regulations System, 48 Code of Federal Regulations, chapter 1 (attached at Tab G to 1995 U.S. Response) and related agency specific regulations (attached at Tabs G & H to 1995 U.S. Response).

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal: As described at pages 25-30 of the 1995 U.S. Response, the FCPA also contains civil provisions, enabling the SEC and the Department of Justice to obtain injunctions against companies that violate the FCPA's books and records and anti-bribery provisions. Pursuant to its authority over issuers, the SEC has promulgated two rules prohibiting the falsification of a companies books and records and prohibiting an issuer's officers from lying to or making materially false or misleading statements to an issuer's internal accountants or its independent auditors. *See* Regulations §§ 240.13b2-1 and 240.13b2-2 (attached at Tab A-6 to 1995 U.S. Response). In addition, the RICO statute provides for civil penalties and some courts have held that the FCPA may provide a predicate for a civil RICO suit brought by a private plaintiff. *See* Tab C to 1995 U.S. Response.

2. Criminalization of Bribery of Foreign Public Officials

See section A above.

3. Tax Deductibility

3.1 Describe how the tax laws and regulations of your country treat bribes of foreign public officials, in particular whether such bribes are deductible.

The United States Internal Revenue Code provides:

No deduction shall be allowed . . . for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977.

I.R.C. 162(c)(1) (26 U.S.C. § 162(c)(1)). *See also* 26 C.F.R. §1.212-1(p) (nontrade or nonbusiness expenses also non-deductible if they are of a type disallowed under § 162(c)). Section 162(c) also applies to payments to foreign officials that, if made to a U.S. official in the U.S., would be unlawful under U.S. laws. 26 C.F.R. § 1.162-18(a)(1)(ii). In addition, this provision applies to "indirect payments" which include payments "which inures to [the foreign official's] benefit or promotes his interests, regardless of the medium in which the payment is made and regardless of the identity of the immediate recipient or payor." 26 C.F.R. § 1.162-18(a)(2). The government bears the burden of proof to show that the payment was unlawful, but a criminal conviction or civil judgment is not a prerequisite. I.R.C. §162(c)(1); 26 C.F.R. § 1.162-18(a)(5).

In addition, illegal bribes, kickbacks, or other payments to public officials by "controlled foreign corporations" are included as income to the U.S. parent corporation. 26 C.F.R. § 1.952-1(a)(4); 26 C.F.R. § 1.964-1(5). In addition, a taxpayer's "basis," or the amount of his investment in a closely-held corporation, is reduced by the amount of any illegal bribes, kickbacks, and other unlawful payments. 26 C.F.R. § 1.1367-1. This increases the tax ultimately paid when the taxpayer sells or otherwise disposes of his share in the corporation.

4. Accounting requirements, External Audit and Internal Company Controls

4.1 Are the laws, rules, and practices with respect to accounting requirements, external audit, and internal company controls consistent with the principles set forth in Section V of the Recommendation? Explain briefly. (Note questions 8.1, 8.2, and 8.3 in Section A above.)

As described above in response to questions 8.1, 8.2, and 8.3 in Section A and below, U.S. laws, rules, and practices regarding accounting requirements, external audit, and internal company controls are consistent with the principles set forth in Section V of the Recommendation.

Adequate Accounting Requirements

Section 13(b)(2) of the Securities Exchange Act of 1934 applies to companies with securities that are registered

with the SEC and requires that such companies keep accurate books and records and maintain adequate internal accounting controls. Section 13(b)(5) makes it illegal for any person to knowingly assist a company in its failure to follow Section 13(b)(2). Rule 13b2-1 and Rule 13b2-2, promulgated by the SEC under Exchange Act Section 13(b)2), provide that the SEC can take legal action against persons who directly or indirectly falsify books and records of a public company or who lie to or otherwise mislead accountants in connection with the preparation or audit of financial statements that are included in a filing made with the SEC.

The SEC requires that public companies prepare financial statements in conformity with Generally Accepted Accounting Principles ("GAAP"). Among other things, GAAP require companies to record or disclose in their financial statements all material contingent liabilities.

Independent External Audit

U.S. law and SEC rules require public companies to undergo an annual external audit of their financial statements and to file for public view those audited financial statements with the SEC. Companies registering securities for the first time are also required to file financial statements audited by an external auditor with the SEC and to provide those financial statements to investors before their securities can be sold to the public. SEC rules and the code of professional conduct issued by the American Institute of Certified Public Accountants ("AICPA") require external auditors to be independent of the companies they audit.

The SEC requires auditors of public companies to comply with Generally Accepted Auditing Standards ("GAAS") in performing their audits. GAAS are professional standards established by the AICPA with SEC oversight. GAAS address the auditor's responsibility concerning material errors, irregularities or illegal acts by a client and its officers, directors, and employees. Additionally, the auditor has a responsibility to obtain an understanding of an entity's internal control structure, and when an auditor becomes aware of certain reportable conditions relating to weaknesses in internal controls during an audit, the auditor has a responsibility under GAAS to report such conditions to the board of directors of the company.

In 1995, Congress added Section 10A to the Exchange Act to address the responsibilities of independent auditors who discover an illegal act, such as the payment of bribes to domestic and foreign government officials, in connection with their audits of public companies. Generally, Section 10A requires that auditors who become aware of illegal acts report such acts to appropriate levels within the company, and if the company fails to take appropriate action, provides for notification to the SEC by the auditor. If the SEC finds that an independent public accountant has willfully violated this section, the SEC may issue a cease and desist order or impose a civil penalty against the accountant and any other person that was a cause of such violation.

Internal Company Controls

As stated above, Section 13(b)(2) of the Securities Exchange Act of 1934 requires that public companies maintain adequate internal accounting controls. Investment companies and certain broker dealers are required to file with the SEC reports from their auditors on the entities' internal control systems. The Auditing Standards Board of the AICPA has promulgated a professional standard that guides auditors when reporting on managements assertions regarding the effectiveness of the company's system of internal control over financial reporting.

All companies registered on the major U.S. stock exchanges and with NASDAQ are required to maintain an audit committee of the board of directors that consists of at least a majority of independent directors. Additionally, all banks and savings and loan associations are required to maintain an audit committee of the board of directors made up entirely of independent directors.

When auditors report instances of potential illegal acts committed by a company or its management to the SEC, they are protected from private actions regarding the contents of their report by Section 10A of the Private Securities Litigation Reform Act of 1995.

4.2 Has your country either reviewed or modified laws, rules, and practices with respect to accounting requirements, external audit, and internal company controls in view of the principles set forth in Section V of the Recommendation? Has your country taken steps to improve the use of such laws, rules, and practices in order to prevent and detect bribery of foreign public officials in international business transactions?

See response to Question 4.1 above.

5. Public Procurement

5.1 Do your country's laws and regulations permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of your national laws? (Note question 3.7 in question A above.)

Departments and agencies of the United States may suspend companies accused of fraud or "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." F.A.R. § 9.407-2(a) (48 C.F.R. § 407-2(a)). Upon conviction or civil judgment, the government may bar such companies from all public contracts for a period of three years. F.A.R. § 9.406-2(a) (48 C.F.R. § 9.406-2(a)). Suspension and disbarment is not limited to the specific program or agency defrauded and applies to the all government contracting. F.A.R. § 9-401. (48 C.F.R. § 9.401). In addition, specific agencies, such as the Overseas Private Investment Corporation and the Commodity Credit Corporation have specific FCPA disbarment provisions. *See* Foreign Assistance Act of 1961 § 237(1); 7 C.F.R. § 1493.270.

5.2 Does your country apply procurement sanctions to enterprises that are determined to have bribed domestic

public officials? Are such sanctions applicable in cases of bribery of foreign public officials?

See 5.1 above.

6. International Co-operation

6.1 Has your country explored or taken any steps to improve the efficiency of the mutual legal assistance that you are able to render to other participants in cases of bribery of foreign public officials.

The United States continually strives to improve the efficiency of mutual legal assistance provided to other states in all criminal investigations, including those for bribery of foreign officials. Our efforts in this respect include:

(1) We have dramatically expanded the number of bilateral mutual legal assistance treaties (MLATs) in force. The U.S. is currently a party to twenty MLATs in force, and we have signed twenty new MLATs in the past two years. We also signed the Organization of American States (OAS) Mutual Legal Assistance Treaty, which provides for mutual assistance relationships with thirty three other nations, and participated in the negotiation of a proposed United Nations Convention on Organized Crime that would include provisions on global mutual legal assistance. We also signed nineteen new extradition treaties in the past two years, and each of these could permit extradition for bribery of foreign officials.

(2) Last year, we proposed to our Congress to enact new federal laws to streamline the legal procedures within the U.S. for providing assistance to foreign authorities. That legislation is still pending.

(3) In February, 1998, the United States demonstrated its support for the improvement of international cooperation procedures by hosting a United Nations Expert Working Group meeting on modernizing the UN Model Mutual Assistance Treaty, a document that is used around the world in MLAT negotiations. The Expert Group recommended several changes to the Model Treaty aimed at increasing the efficiency of mutual assistance practice.

(4) In the past two years, we have consulted with other nations on the implementation of our bilateral MLATs and other instruments on international cooperation.

(5) In January, 1998, we conducted extensive training to U.S. prosecutors and investigative officials on techniques for promptly executing foreign requests for mutual legal assistance.

1. The United States federal securities laws have been applied to state-owned enterprises in other contexts. A civil injunctive action was brought by the SEC in 1977 against Pertamina, the state-owned oil enterprise of Indonesia, for having solicited the sale of stock in a New York restaurant. Pertamina consented to the entry of a permanent injunction against violation of the United States federal securities laws.

Supplemental Response to the Phase I Questionnaire

Note: Subsequent to filing its response to the Phase I questionnaire, the United States supplemented its answers with the following additional information and clarifications. The United States has also provided additional information in response to questions received from other OECD members.

ARTICLE 1 THE OFFENSE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

1.1.2 The legislative history also refers to "evil motive or purpose". Does this imply that intent alone, without "evil motive", would not be enough for violation of the FCPA?

The FCPA is a specific intent crime. This means that the government does not satisfy its burden of proof merely by showing that the defendant intended to do a particular act and that he thereby violated the statute, as is required for general intent crimes. Instead, the government is required to prove that the defendant acted "corruptly," or as set forth in the legislative history, with an "evil motive or purpose, an intent to wrongfully influence the recipient." S. Rep. No. 114, 95th Cong. 1st Sess. 10 (1977). The language in the legislative history is not an additional requirement but a definition of "corrupt intent." As explained in *United States v. Liebo,* 923 F.2d 1308, 1312 (8th Cir. 1991), "An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term 'corruptly' is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position." *Cf. Bryan v. United States,* 118 S.Ct. 1939, 1945 (1998) (approving a similar definition of "willful"). Thus, an intent that is not corrupt will not violate the statute.

1.1.3 Since the Convention prescribes that the offence be directed at the offering, promising or giving of any undue pecuniary or other advantage, the precise meaning of *"acts in furtherance of"* is unclear. Does this encompass the simple communication of a bribe in person? Additionally, the "act in furtherance" of the bribe is not consistent in relation to the different categories of persons (*see* part 4 Jurisdiction).

The "act in furtherance" element is intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so. Proof of an act in furtherance establishes that the defendant did not merely think about and then reject the idea of paying a bribe but instead committed himself to doing it and thereafter took some act to accomplish his objective. Further, in most cases, several individuals may be involved in authorizing or making a bribe payment or offer at different stages in the process. The "act in furtherance" requirement makes it clear that a person does not have to have been a participant in every stage of the process to be prosecuted under the Act.

It is not required that the defendant actually pay the bribe. The simple offer, whether conveyed in person or through intermediaries, is sufficient to complete the crime.

The FCPA, as amended, is consistent in its requirement of an "act in furtherance" regardless of the identity of the defendant. All defendants, regardless of their nationality, must have taken some act in furtherance of the unlawful payment.(1)

The FCPA does distinguish between U.S. companies and nationals, on the one hand, and foreign companies and nationals, on the other, in terms of the requisite location of the act (anywhere in the world for U.S. companies and nationals vs. in the U.S. for foreign companies and nationals) and the requisite nature of the act (use of interstate means or instrumentalities for U.S. companies and nationals while in the U.S. *vs.* any act in the U.S. for foreign companies and nationals). The basis of this jurisdictional distinction is the limited jurisdiction granted to the federal government in the U.S. Constitution "to regulate commerce with foreign Nations, and among the several States." U.S. Const., Art. I, sec. 8. cl.3; *see also* U.S. Const., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As set forth in the legislative history for the 1998 amendments, this interstate commerce nexus is satisfied for non-U.S. nationals and businesses who, by their very nature, are acting in international commerce when they enter the U.S. to take an action in furtherance of a bribe overseas. Similarly, when a U.S. national or business acts abroad, it necessarily acts in international commerce. *See* S. Rep. 277, 105th Cong., 2nd Sess. (1998); H. Rep. 802, 105th Cong., 2nd Sess. (1998).

1.1.4 Can the U.S. clarify whether the term "anything of value" in the FCPA is as comprehensive as "other advantage" in the Convention?

The United States views "anything of value" as being as comprehensive as "other advantage." "Anything of value" means any thing that is of value to the recipient. It therefore is interpreted according to its plain meaning and encompasses anything that is given to an official to obtain an improper advantage in a business transaction. For instance, in the very first FCPA prosecution, *U.S. v. Kenny Int'l Corp.* (D.D.C. 1979), the bribe was provided to pay the cost of chartering an aircraft to fly voters to the Cook Islands to re-elect the Premier.

Can the U.S. cite case law on either of the affirmative defenses, particularly for "reasonable and bona fide expenditure"?

There is no case law on this issue. However, the issue has arisen in the context of FCPA Review Procedure requests.(2)

In Release 81-02 (December 11, 1981), the Department stated it would take no enforcement action where the requestor wished to provide samples of its products to officials of the Soviet Ministry of Foreign Trade. The Department stated that the FCPA was not implicated where (i) the samples were intended for the officials' inspection, testing, and sampling; (ii) the samples were not intended for their personal use; and (iii) the Soviet government had been informed that the company intended to provide the samples.

In Releases 82-01 (January 27, 1982), 83-03 (July 26, 1983), and 85-01 (July 16, 1985), the Department stated it would take no enforcement action where the requestor intended to host foreign officials while they were attending meetings, site inspections, and product demonstrations and to pay "reasonable and necessary expenses, including meals, lodging, entertainment, and traveling." Similarly, in Releases 92-01 (February 1992) and 96-01 (November 25, 1996), the Department found that the FCPA was not implicated by agreements to provide training to government personnel as part of joint ventures with foreign governments.

In Release 83-02 (July 26, 1983), the Department stated that it would take no enforcement action where an American company proposed to invite the general manager of a foreign government entity to extend his vacation in the United States to take a promotional tour of the company's facilities. The company would pay the reasonable and necessary actual expenses of the general manager and his wife during the time he spent touring its facilities. The Department concluded that the FCPA was not implicated where the expenses would be paid directly to the service providers and not to the general manager and the expenses would be accurately recorded in the company's books and records.

1.1.6 *Public Enterprises:* Is there case law on this point?

There is no case law on this issue. However, in several FCPA Review Procedure Releases, the Department has treated entities that were owned or controlled by a foreign government as instrumentalities of the foreign government. *See* Release 80-04 (October 29, 1980) (Saudia, the Saudi government-owned airline), Release 83-2 (July 26, 1983) (expenses of a general manager of a foreign entity that was owned and controlled by the foreign government); Release 93-01 (April 20, 1993) (a quasi-commercial entity wholly owned and supervised by a foreign government); Release 96-02 (November 26, 1996) (state-owned enterprise).

Official capacity vs. public function: Is there case law on this point?

The phrase "official capacity" is self-explanatory. It is intended to distinguish between acts that an official does or is able to do because he holds a position as a public official as opposed to acts that he may do as a private person.

This issue was addressed in part in FCPA Review Procedure Release 95-02 (September 14, 1995), the Department stated that it would take no enforcement action concerning a proposed creation of a company in a foreign country in which a majority of the investors would be foreign officials. The Department concluded that the FCPA was not implicated where, *inter alia*, no official of the relevant ministry of foreign country would be an investor in the company and none of the investors were in positions which

would enable them to grant or deny business to the company. In addition, the government officials who were investors in the company certified to the Department that they would recuse themselves from any government decision with respect to any matter affecting the company, that their official duties did not include responsibility for deciding or overseeing the award of business by the government to the parties to this request, and that they would not seek to influence other foreign government officials whose duties include such responsibilities.

In Release 95-03 (September 14, 1995), the Department stated that it would take no enforcement action concerning a joint venture with a relative of the leader of a foreign country who was a prominent businessman and was also, due to his holding various public and party offices, a foreign official. The Department concluded that the FCPA was not implicated where the foreign joint venturer's official duties did not involve awarding or denying business to the company and he undertook to notify the company if his duties changed, where the joint venture partner agreed to initiate no meetings with government officials, and where he agreed, when meeting with government officials, to certify to the most senior official present that he was acting solely in a private capacity.

1.1.9 It is not clear whether the addition of "to secure any improper advantage" to that list is meant to comply with the Convention's requirements here, and if so, how in fact this would operate.

The Commentaries define "improper advantage" as "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements." OECD Commentaries at ¶ 4. The United States has long interpreted the three pre-existing elements of the FCPA (payments to influence any official act or decision of an official, to induce the official to do or omit to do any act in violation of his official duty, or to induce the official to use his influence to affect any act or decision of the government) to encompass payments "to secure any improper advantage," as defined in the Commentaries. The insertion of the Convention's language into the statute merely clarified and lent a Congressional imprimatur to that interpretation.

For example, in a recent prosecution, under the pre-1998 version of the FCPA, the United States charged a corporation and two of its executives with authorizing a payment to Panamanian officials to obtain a favorable lease in the Panama Canal Zone. The United States, and the jury, interpreted this payment as being intended to assist the defendant corporation in obtaining or retaining business because the lease would improve its competitiveness and profitability. See *United States v. Saybolt Inc.* (98 Cr 10266 WGY) D. Mass. 1998; *United States v. David Mead & Frerik Pluimers* (Cr. 98-240-01) D.N.J., Trenton Div. 1998.

***Routine governmental action:* Is there case law on this point?**

There is no published case law on this matter. As noted, in the recent Saybolt matter, the U.S. prosecuted the company under the theory that payment to Panamanian officials to obtain a favorable lease was intended to obtain or retain business. The United States did not, in that case, consider the awarding of a lease a routine governmental action.

ARTICLE 2 - RESPONSIBILITY OF LEGAL PERSONS

2.1.2 Will accountability lie even when there have been no unlawful acts by a "superior"?

Under U.S. law, corporate liability is not predicated upon authorization by a "superior" or manager. A corporation is liable for the acts of its employees, of whatever rank, if they act within the scope of their duties and for the benefit of the corporation. Whether the corporate management condoned or condemned the employee's conduct is irrelevant.

ARTICLE 3 - SANCTIONS

3.3 Could the U.S. confirm that these penalties are sufficient to enable compliance with requests for mutual legal assistance?

The United States will honor requests for mutual legal assistance premised on the Convention. The United States generally does not link the providing of mutual legal assistance to other States with the penalty that it imposes for the analogous domestic violation.

3.4 Could the U.S. confirm that these penalties are sufficient to enable the compliance with requests for extradition?

Generally, our extradition treaties provide for extradition for any offense that is punishable under the laws of both the requesting and requested State by a maximum term of imprisonment exceeding one year. The penalty for a violation of the FCPA is well in excess of one year. Accordingly, even prior to the U.S. becoming a Party to the OECD Convention, if the foreign State requesting extradition under such a treaty had also penalized foreign commercial bribery by a maximum term of imprisonment exceeding one year, extradition would be have been possible, subject to the other terms of the treaty. In any event, once the United States became party to the OECD Convention, under Article 10(1) of the Convention all of our extradition treaties with countries that have also ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

A number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. As stated above, once the United States became a party to the OECD Convention, under Article 10(1) of the Convention our extradition treaties with countries that have ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

3.6 Since there is a ceiling on the possible fine, the full value of the bribe and proceeds of bribery, or the

property the value of which corresponds to that of such proceeds, may not be fully recovered. Could the U.S. clarify what factors determine the amount of sanctions?

There is, in fact, no ceiling on the possible fine. Fines imposed for violations of the FCPA, like those imposed in all federal criminal cases are governed by the Alternative Fines Act, 18 U.S.C. § 3571. This Act states:

Alternative fine based on gain or loss.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

This section, therefore, ensures that a fine well in excess of the full value of the bribe and the proceeds of bribery may be imposed. It is sufficient to assure that "the bribe and the proceeds of the bribery of a foreign official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation *or that monetary sanctions of comparable effect* are applicable." OECD Convention, art. 3, ¶ 3.

In practice, sentencing of individuals and businesses in the United States is governed by the Sentencing Guidelines. These Guidelines require the Court to impose a fine based upon an offense level that is tied directly to "the value of the bribe or the improper benefit to be conferred." *See* U.S.S.G. § 2B4.1(b)(1). The commentary makes it clear that the "value of the improper benefit" refers to the "value of the action to be taken or effected in return for the bribe." U.S.S.G. § 2B4.1 comment. (n.2). The commentary also provides an example:

[I]f a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the $25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain.

U.S.S.G. §2B4.1 comment. (backg'd).

The same rules apply to domestic corruption cases. *See* U.S.S.G. 2C1.1. As set forth in the commentary to that Guideline:

The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a $500 bribe reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) a $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

Id. at comment. (n.2). The commentary continues:

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.

Id. at comment. (backg'd).

In practice, assume, as set forth in the example above, that a bribe is paid for a contract that results in a benefit to an individual or a corporation of $20,000. Applying the Guidelines and not making any adjustments for acceptance of responsibility, role in the offense, or criminal history, that benefit results in an offense level of 12. *See* U.S.S.G. § 2B4.1, 2F1.1. With that offense level, the court is required to impose a fine between $3,000 and $30,000. For a corporate defendant, again making no adjustments, the court is required to impose a fine between $40,000 and $80,000, and the fine could be even more depending on the actual pecuniary gain to the corporation. *See* U.S.S.G. §§ 8C2.4, 8C2.5, and 8C2.6.

Sharing of forfeited assets with foreign countries: *Please confirm.*

The United States has a firm policy of sharing with foreign governments property that has been forfeited to the United States with the assistance of foreign authorities. Since 1989, the United States has shared more than $173.2 million with the governments of thirty different nations in recognition of their efforts in achieving forfeitures under United States law. Other nations have shared approximately $19.6 million in forfeited assets with the United States. We believe that mutual asset forfeiture sharing creates an additional incentive for law enforcement authorities to cooperate with one another and, as a result, an atmosphere in which more assets are actually forfeited and more criminal enterprises are dismantled.

Under United States law, there are three statutory bases through which the Attorney General and/or the Secretary of the Treasury may transfer forfeited property to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property: 18 U.S.C. § 981(i)(1) (for money laundering forfeitures), 21 U.S.C. § 881(e)(1)(E) (for drug related forfeitures) and 31 U.S.C. § 973(h)(2) (for property forfeited under laws enforced by the Department of the Treasury). All three statutes condition such a transfer upon: (1) approval by the Attorney General or the Secretary of the Treasury, (2) approval by the Secretary of State, (3) authorization for such a transfer in an international agreement between the

United Sates and the foreign country to which the property would be transferred; and (4) if applicable, certification of the foreign country under 22 U.S.C. § 2291(h) (Section 481(h) of the Foreign Assistance Act of 1961). As a result, to the extent that property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions is forfeited to the United States as a result of money laundering offenses, the United States could share that property with foreign governments.

To facilitate international sharing, the United States has entered into numerous agreements that permit the transfer of assets to other nations, including at least seven that could apply should property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions be forfeited to the United States. In addition, forfeiture articles in Mutual Legal Assistance Treaties between the United States and several additional nations include provisions that would permit international sharing. Where no standing agreement on the sharing of forfeited assets exists between the United States and other nations, the United States typically negotiates case-specific agreements that permit the transfer of such property.

ARTICLE 4 - JURISDICTION

4.2. Can the US comment on whether it expects that U.S. jurisdiction over nationals will be more frequently invoked in relation to offenses committed in contravention of the FCPA?

The United States does not expect the addition of nationality jurisdiction to have a significant impact upon the volume of prosecutions. The territorial jurisdiction in place since 1977 is extremely broad and requires only that some act in furtherance, one that need not even be criminal in and of itself, take place in the United States. The amendment of the statute to include nationality jurisdiction, however, eases the government's burden by enabling a prosecution to proceed on that basis alone without the need to prove an act was committed within U.S. territory.

4.3 Are there any legal instruments requiring consultation and eventual transfer of a case to another Party?

Apart from the obligation to consult contained in Article 4, the United States is not a party to any international legal instrument that absolutely obligates it to consult regarding, or eventually transfer to another Party for investigation or prosecution, a criminal case covered by this Convention. As a practical matter, as stated in our previous response provided, we consult regularly with our law enforcement partners in such matters.

4.4 Could the U.S. comment on the rationale for the difference in treatment and whether this may lead to uneven application of the legislation?

As set forth above, the difference in treatment is due to federal constitutional principles and the requirement that a federal crime have a federal nexus, here the use of means or an instrumentality of interstate commerce. The United States does not believe that this will result in an uneven application of the legislation. It would be a rare case in which a business in the United States succeeded in authorizing or paying a bribe without making use of the mails or other means or instrumentalities of interstate commerce. For example, such means and instrumentalities include phone lines, thus encompassing all phone calls, fax transmissions, telexes, and email messages, air, sea, rail, and auto travel, as well as interstate and international bank wire transfers. Moreover, the communication or travel need not actually cross interstate or international boundaries; it is sufficient if the defendant made use of interstate instrumentalities even for intrastate communication or travel. *See* 15 U.S.C. §§ 78c(a)(17), 78dd-2(h(5), 78dd-2(f)(5).

ARTICLE 5 - ENFORCEMENT

5.1. Is there scope for the Department of Justice to refuse to prosecute a case? If so, under what circumstances? Is the refusal to prosecute made public?

The United States respectfully refers the Secretariat to Section 5 of its response to the Phase 1 questionnaire. The decision whether to initiate or decline charges in a particular case is governed by the following factors:

1. Federal law enforcement priorities;

2. The nature and seriousness of the offense;

3. The deterrent effect of prosecution;

4. The person's culpability in connection with the offense;

5. The person's history with respect to criminal activity;

6. The person's willingness to cooperate in the investigation or prosecution of others; and

7. The probable sentence or other consequences if the person is convicted.

Principles of Federal Prosecution, U.S. Attorney's Manual §9-27.230.

The Department's decision not to prosecute generally is not made public. The Department, however, may notify a target individual or company that an investigation has been concluded, and the company may choose to release that information.

ARTICLE 9 - MUTUAL LEGAL ASSISTANCE

9.2 Could the U.S. confirm whether in a case where, pursuant to a treaty between the U.S. and another Party, mutual legal assistance is conditional or dual criminality, it will be deemed to exist if the offence in question is within the scope of the conviction?

The United States generally does not require dual criminality as a condition precedent to the providing of mutual legal assistance. Where a request for mutual legal assistance from another State requires the taking of extremely intrusive measures (for example, the issuance and execution of a warrant for search and seizure), dual criminality may be required. However, where required, the dual criminality principle has always been interpreted liberally in favor of providing international cooperation. Indeed,

with respect to the offenses covered by the Convention, as set forth in Article 9(2), seeking mutual legal assistance for an offense established pursuant to Article 1 of the Convention will satisfy any dual criminality requirement imposed under U.S. laws or treaties.

9.3 Does this mean that it is possible to decline assistance on the ground of bank secrecy?

When seeking court orders on behalf of foreign States that seek mutual legal assistance, the United States has taken the position before its courts that assistance may not be declined as a result of privacy provisions of U.S. banking law. Moreover, it is the policy of the United States that where a domestic law provides for executive discretion in denying assistance, the executive branch does not decline assistance on that basis.

ARTICLE 10 - EXTRADITION

10.2 What is the situation in cases where the U.S. does not have a bilateral treaty in force and there is a request for extradition for the offences covered by the Convention? Where bilateral treaties exist, is it possible that in practice their efficacy could be limited because extradition may be limited to offences specifically listed in the treaty?

Under U.S. law, extradition for the offenses established by the Convention may be carried out only if there is an extradition treaty in force between the United States and the State seeking extradition. With respect to the second question, as stated in the response to question 3.4 above, a number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. However, once we became party to the OECD Convention, under Article 10(1) of the Convention, our older "list" extradition treaties were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

10.3 Can the U.S. clarify whether it is possible to decline extradition on the ground of nationality. If so, under which circumstances?

It is the policy of the United States not to decline extradition on the ground of nationality. Moreover, under Title 18, United States Code, Section 3196, the extradition of U.S. nationals is authorized (subject to the other requirements of the applicable treaty) even where the applicable extradition treaty does not obligate the United States to do so.

1. If, however, a group of individuals is charged with conspiracy to violate the FCPA under 18 U.S.C. § 371, the government must only prove that each defendant entered into the criminal *agreement* and that, thereafter, at least one conspirator did an overt act in furtherance of the agreement.

2. The Releases discussed herein are intended only as examples of the Department of Justice's interpretation and application of the FCPA in particular contexts. Pursuant to the FCPA, the Department has promulgated regulations that permit issuers and domestic concerns to obtain a statement from the Department "as to whether a certain, specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy." See 28 C.F.R. § 80.1.An Opinion Release issued pursuant to these regulations is binding on the Department of Justice only, and not other agencies of the United States Government, is applicable only to parties which join in the request, and provides a safe harbor only to the extent that a requestor accurately describes the proposed transaction. *See* 28 C.F.R. §§ 80.4, 80.10, 80.11, 80.13.